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Office of Administrative Law Judges
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Issue Date: 08 August 2003

CASE NO. 2003-AIR-00005

In the Matter of

SUSAN P. TRECHAK,
Complainant,

v.

AMERICAN AIRLINES, INC.,
Respondent.

Appearances:

Susan P. Trechak
Santa Maria, CA
Complainant, Pro se

Kenneth R. O'Brien, Esq.,
Sacramento, CA
for Respondent

Before:
Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arose when the complainant, Susan P. Trechak ("Complainant"), filed a complaint under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C.A. § 42121, alleging that her employer, American Airlines, Inc. ("American" or "Respondent") retaliated against her by involuntarily reassigning her to another position because, as part of her work duties, she

developed a scheduling tool that reported mechanic availability two weeks in advance at Los Angeles International Airport ("LAX") that was used by Respondent's managers to create mechanic work schedules. An Occupational Safety and Health Administration ("OSHA") investigation determined that Complainant's July 17, 2002 complaint filing, after alleging prior adverse acts occurring on December 14, 2001 and January 5, 2002, showed that she had failed to meet the requirements for the timely filing of her complaint and failed to articulate a *prima facie* case of employment discrimination. Therefore, OSHA dismissed the complaint for lack of merit. Complainant filed a timely request for hearing with the Office of Administrative Law Judges ("OALJ").

On December 23, 2002, prior to formal hearing, I issued an Order to Show Cause Why Case Should Not Be Dismissed for Untimely Filed Complaint and continued the hearing in the case to March 12, 2003 in Santa Barbara, California ("OSC"). ALJX 2. Complainant submitted voluminous documentation in excess of four inches in support of her response to the OSC. Complainant's factual summary, exhibits, and arguments almost entirely related to the merits of her case rather than on the issue concerning the timeliness of her complaint filing. Hidden within the hundreds of pages of documents was a conclusory medical assessment of Complainant dated March 19, 2002 by psychiatrist Nir Y. Lorant, M.D. I found that a factual dispute existed as to Complainant's mental condition in March 2002 and her ability to accomplish numerous filings and tasks during the same time.

On January 29, 2003, I issued an Order Finding Good Cause for Hearing on the sole issue of whether the Complainant has provided equitable reasons why she did not file her complaint within 90 days of the alleged adverse act(s). ALJX 3. This Order limited the scope of the upcoming March 12 evidentiary hearing to the bifurcated issues of the timeliness of Complainant's filing of her complaint and whether equitable reasons existed to toll the statute of limitations. Discovery orders were later issued to extend the discovery cut-off period but also to limit the scope of discovery to issues related to the bifurcated hearing set for March 12, 2003. ALJXs 4 and 5.

On February 19, 2003, I issued an order extending the discovery cutoff date to March 3, 2003. I further ordered that the seven subpoenas issued on February 14, 2003, are limited in scope to be document subpoenas only and do not involve the appearance of witnesses. The subpoenas were further limited to request documents reasonably calculated to lead to discoverable information concerning the sole issues for hearing on March 12, 2003, that is, information concerning equitable tolling and the applicable statute of limitations in this case. On March 10, 2003, Complainant filed a motion to compel further responses by Respondent to seven subpoenas served and Respondent objected.

On March 12, 2003, a formal hearing was held in Santa Barbara, California as to the motion to compel and the bifurcated issue of whether any equitable reasons existed to toll the running of the applicable 90-day statute of limitations for Complainant to file her complaint in this case. Complainant, whom represented herself in *pro se*, testified with no other witnesses.

Respondent was represented by counsel who cross-examined Complainant but also presented no additional witnesses. The following exhibits were admitted into evidence: Complainant's Exhibits ("CXH") 1B, 1C-L, 1N-S, 2, 3A, 4B-H, 5B-D, 5N-R, 6C, 6D, 6I, 6J, 7A, 7C–I; Respondent's exhibits ("RX") 1-19; and Administrative Law Judge Exhibits ("ALJX") 1-9.[1] Complainant's Exhibits CXH1A, 1M, 4A, 4I, 5A, 5E-M, 5S-U, 6A, 6B, 7B, 7J, and 7K were not admitted into evidence having either been withdrawn or denied for reasons referenced in the record. TR[2] pp. 18-22, 30-65, 183-192. The parties submitted post-hearing briefs on May 2, 2003, the record closed, and this Court took the matter under submission.

After reviewing all of the evidence, I hold that the complaint in this case be dismissed as untimely as there are no equitable reasons for tolling the 90 day statute of limitations. Even so, I further find that Complainant did not take part in a protected activity when, as part of her regular duties, she developed the scheduling tool that reported mechanic availability two weeks in advance at Los Angeles International Airport ("LAX") that was used by Respondent's managers to create mechanic work schedules. In addition, I hold that there were no other protected activities or adverse actions related to any protected activities within 90 days of the July 17, 2002 complaint filed in this case.

STIPULATIONS

The parties stipulate, and I accept that:

a) The complaint is this case was filed by Complainant on July 17, 2002.

b) The applicable statute of limitations for filing a complaint in a case like this under AIR 21 is 90 days as referenced at 42 U.S.C.A. § 42121(B)(1).

TR, p.7.

ISSUES

The unresolved issues in this proceeding are:

1) Complainant's Motion to Compel Further Discovery;

2) Whether Complainant timely filed her complaint;

3) Whether Complainant has carried her burden of establishing that she is entitled to equitable tolling of the limitations period; and

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[1]ALJ Exhibits 8 AND 9, respectively, are comprised of Complainant's Closing Brief (ALJX8) and Respondent's Closing Brief (ALJX9) without documentary attachments.

[2]The abbreviation "TR" refers to the hearing transcript.

4) Whether the Complainant engaged in protected activity or was subjected to adverse acts by Respondent?

FINDINGS OF FACT

Complainant started working at Respondent's affiliate - American Eagle in San Luis Obispo, California in 1983. TR, p. 67. At that time she was employed first as a financial staff and inventory analyst later to be transferred to a ticket agent and then a ramp agent. Id; CXH7(A), p. 1. Complainant became a permanent employee with Respondent as of January 9, 1994. CXH7(A), p. 1. Sometime in 1998, while ramping, Complainant injured her neck. TR, p. 68. The neck injury prevented Complainant from continuing as a ramp agent so she transferred to Respondent's corporate headquarters in Dallas-Fort Worth in the position of inventory control analyst in September 1998. TR, pp. 69-70.

Complainant found commuting from Texas to California difficult so she applied and was transferred to Los Angeles as a production control coordinator in Respondent's maintenance department in May 2000. TR, p. 70. Complainant's neck restrictions prevented her from starting this position and, consequently, she was un-hired by Respondent in June 2000. *Id.* Her status at this time with Respondent was that she was on leave without pay. TR, p. 71. Complainant testified that she really wanted this position in Los Angeles so she saw a neurosurgeon and she persuaded him to lift her neck restrictions to the point where she could perform the production control coordinator position. TR, p. 70. Complainant was rehired into this position with Respondent at the end of August 2000. *Id.*

Complainant further testified that she found her position with Respondent as a production control coordinator to be an un-challenging clerk position and a voluntary three-level self-demotion from the management work she performed in Dallas. TR, p. 71; CXH7(A), p. 3.

In April, 2001, Complainant was laterally transferred to the position of production control crew scheduler for Respondent's maintenance personnel. TR, p. 72; CXH7(A), p. 1. As part of her scheduling position, Complainant created a scheduling tool that reported manpower availability for each overnight airplane at the Los Angeles International Airport ("LAX"). TR, pp. 73-74. This scheduling tool was used in conjunction with scheduling classes and also to help managers pro-actively plan their distribution of maintenance manpower two weeks in advance. TR, p. 74.

Sometime after September 11, 2001, Complainant told her supervisor, Mr. Lee, that she would like to move up at Respondent and seeing no immediate opportunities at LAX, Complainant wanted to apply outside of LAX in order to secure an analyst position with Respondent. CXH7(A), p. 46.

At the end of November 2001, Complainant was approached by her supervisor, Mr. Lee, and informed that Respondent manager, Tony Evans, had decided to cross-train everyone in Mr. Lee's department including Complainant. TR, pp. 79-80; RX18, p. 27.

On December 14, 2001, Mr. Lee told Complainant that she should expect to swap positions with someone working as a production control coordinator. TR, pp. 81-82, 85-87; CXH1(G). This expected reassignment was not permanent as understood by Complainant and was a lateral reassignment. TR, p. 82; CXH7(A), p. 31.

Complainant informed her supervisor Mr. Lee that her physical restrictions interfered with her ability to perform the position of production control coordinator. CXH1(G). Mr. Lee responded by pointing out to Complainant that she and her physician lifted all of her restrictions when she was hired at LAX yet he was willing to find her alternative work. *Id.*

In late December 2001, Complainant was informed that alternative work had been found as an accommodation to her in the position of senior operations coordinator downstairs from her former position as scheduler. TR, pp. 89-97; CXH7(F).

Complainant alleges that she was involuntarily terminated or wrongfully discharged from her position as production control crew scheduler on January 5, 2002. TR, pp. 97, 99-100; CXH7(A), pp. 23, 31 and 52. She believed that this reassignment was an act of retaliation against her by Respondent. RX15.

On January 14, 2002, Respondent sent Complainant to an agreed qualified medical examination ("QME") with Dr. Richard D. Scheinberg with respect to her neck/back problems as part of the appeal of Complainant's California Workers' Compensation case. TR, pp. 155-156.

Complainant did not immediately start her reassigned position in early January 2002 as she chose to take vacation leave instead from January 5 through January 25, 2002. TR, p. 98. Her first day actually working in her newly reassigned position of operations coordinator was January 26, 2002. TR, pp. 98-99. Complainant worked from January 26 through February 6, 2002.

On or about February 6, 2002, Complainant thanked Mr. Lee, her supervisor, for submitting her application for a position with Respondent as Coordinator Flight Service Operations. RX 2. Complainant also informed Mr. Lee of another two-week vacation she would begin the next day. *Id.* She remained on vacation and did not work until February 22, 2002. RX5. Claimant then worked from February 23, 2002 through March 3, 2002. Complainant used all of her accrued sick leave and 2002 accrued vacation at Respondent by March 3, 2002. CXH7(A), p. 34; RX6. By March 27, 2002, Complainant believed that she was no longer employed with Respondent. TR, p. 135.

On March 7, 2002, Complainant e-mailed her supervisor, Mr. Lee, telling him that she would be out of work for an additional two weeks due to her unspecified medical condition.

RX6. Complainant stated that she believed that she was out of sick leave at that time due to her prior neck injury. *Id.*

On March 19, 2002, Complainant filed an accident report for an alleged stress injury making reference to an increasingly intolerable work environment beginning in October 2001. TR, p. 135; RX8.

On March 27, 2002, Complainant received written notice from Respondent concerning the outcome of her January QME. RX1. As expected by Complainant, Dr. Scheinberg imposed more work restrictions due to Complainant's observed neck problems involving at least two ruptured disks. TR, p. 156; RX 3; RX9. As a result of Dr. Scheinberg's revised restrictions, Complainant was no longer capable of performing the operations coordinator position she had been reassigned to in January 2002. *Id.* Complainant asked for help in finding some other position with Respondent. *Id.* Complainant also believed that she was 52.2% disabled due to her two herniated disks in her neck. CXH7(A), p. 32. Complainant was instructed to contact her supervisor and her regional field human resources representative for accommodation of her work restrictions or for Complainant to submit a completed Request for Accommodation form to be considered for other positions at Respondent. RX9.

On April 3, 2002, Complainant filed a California Employee's Claim for Worker's Compensation Benefits. RX19, p. 5.

From April 17, 2002 through July 9, 2002, focusing on Title VII discrimination issues only and believing the harassment was a local problem at LAX, Complainant mailed nine letters to Respondent's management including its chief executive officer at the time, Mr. Carty, and other Respondent directors. TR, pp. 109-110; CXH2(1)-(9). None of the letters provided information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. *Id.* Instead, the letter and attached draft DFEH complaint referenced alleged violations of law from sexual harassment, age discrimination, discrimination under the Americans with Disabilities Act of 1990 ("ADA"), hostile work environment, and other personnel issues. *Id*. Complainant received no response from Respondent until May 28, 2002 when Armando Cordina, a Respondent Board member, wrote to Complainant acknowledging receipt of her letters and thanking her for including him. CXH7(A), p. 51; CXH2(10).

On May 6, 2002, Complainant requested assistance from Respondent in pursuing two advertised positions at Respondent, one of which was her former position as scheduler. TR, p. 157.

On or about May 10, 2002, Complainant received a letter from the Mr. Jiminez Bailey, Regional Manager Line Maintenance for Respondent, demanding that she return her security clearance badge from the Los Angeles Department of the Airports at LAX because her security clearance had been revoked. TR, pp. 138-139, 141-142, 170-171; RX17. Complainant indicated

that she understood that it was customary to return the badge when an employee is off payroll as the badge is the property of the Los Angeles World Airport and she complied because she knew she was off payroll. CXH6(D).

Complainant declared under penalty of perjury on May 30 , 2002 that: her worker's compensation claim for stress leave on March 25, 2002; her April 17, 2002 filing of a wage claim with the California Department of Industrial Relations, Division of Wage Enforcement; her April 2002 letter-writing campaign to Respondent's Board of Directors and chief executive officer; her hundreds of telephone calls; and her many trips have been made "because American Airlines terminated me from my position of Crew Scheduler for reasons other than performance." CXH7(A), pp. 35-36.

Complainant did not file any Title VII complaint with the Equal Employment Opportunities Commission (EEOC) until June 20, 2002. TR, p. 147; RX19, p.1.

On June 21, 2002, Complainant received a June 19, 2002 letter from Respondent informing her that her status at Respondent had changed from unpaid sick leave to that of an "Unpaid Injury On Duty Leave of Absence" effective on March 8, 2002. TR, pp. 149-150; CXH1(S).

Complainant's argument for filing her complaint in this action on July 17, 2002 was that she had Title VII complaints against Respondent prior to the January 5, 2002 adverse action. TR, p. 79. Complainant filed her EEOC complaint on June 20, 2002. TR, p. 147. Complainant testified that she did not even think about filing an AIR 21 complaint within 90 days of her reassignment because she had Title VII issues pending as the alleged cause of her reassignment. TR, pp. 107-108. Complainant testified that she did not even think about filing an AIR 21 case because of the Title VII issues and because she thought that her problems with Respondent were local to LAX alone and her April 2002 letter-writing campaign to Respondent's Board of Directors would correct the problems. TR, p. 121. Complainant testified that on or about July 9, 2002, she began researching and drafting her AIR 21 complaint. TR, pp. 158-159.

Complainant further testified that her complaint with the California Department of Fair Employment and Housing (DFEH) was not accepted and signed in by the DFEH until August 2002 because either there were problems there or she amended it. TR, p. 147-149; RX19, p. 8. She also testified that she was not mentally incapable of timely filing her AIR 21 complaint at any time so that is not part of her equitable tolling argument. TR, pp. 106-107 and 162.

Complainant also testified that no supervisor or manager at Respondent did anything that prevented her from filing her AIR 21 complaint before July 17, 2002. TR, p. 165. In addition, Complainant testified that at no time did any supervisor or manager at Respondent tell Complainant not to file an AIR 21 complaint. TR, p. 163.

At the time of hearing on March 12, 2003, Complainant's physician had not cleared her to return to work. TR, p. 166-168. Since remaining at Respondent in an unpaid status, Complainant continues to have access to JetNet, a private website that Respondent employees, including people who are employees but are on unpaid status, can access personnel policies, directories, etc. TR, pp. 169-170.

On July 17, 2002, Complainant filed the instant AIR 21 complaint with the U.S. Department of Labor Occupational Safety and Health Administration. TR, p. 7.

Complainant received the written-up complaint from DFEH on July 31, 2002 even though the date of the write-up was May 30, 2002. RX19, p. 8. She did not file it until August 2002. TR, pp. 42, 147-149; RX19, p. 8.

DISCUSSION

I. Motion to Compel Further Discovery

Complainant filed her motion to compel Respondent's further responses to seven subpoenas served in February 2003, the scope of which was later restricted to the bifurcated equitable arguments Complainant was to present at hearing on March 12, 2003. Respondent objected and oral argument was presented at hearing. TR, pp. 8-17.

I find that Respondent produced all relevant documents related to the restricted scope of the seven subpoenas and deny Complainant's motion to compel as it relates to the bifurcated issues set for hearing concerning Complainant's compliance with the applicable statute of limitations and any equitable reasons for tolling the applicable statute. The motion to compel is denied without prejudice to a renewal should the case proceed past the issues heard at hearing on March 12, 2003. TR, p. 17.

II. Timeliness - *The 90 Day Statute of Limitations*

A whistleblower complaint, alleging discrimination under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, must be filed by a complainant within ninety days of the alleged adverse action. 49 U.S.C. § 42121(b)(1)(2002); 29 C.F.R. § 1979.103(d) (2002). The ninety day time period begins to toll "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. § 1979.103(d) (2003); *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 at p. 5 (ALJ Oct. 18, 2002).

"Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *Prybys v. Seminole Tribe of Florida*, 95 CAA 15 (ARB Nov. 27, 1996)(The brief filing period in environmental whistleblowing was the mandate of Congress and the limitations cannot be disregarded even though it bars what might otherwise be a

meritorious case). Discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 2072-73 (2002); *United Air Lines Inc. v. Evans*, 431 U.S. 553, 558 (1977) (finding that acts falling outside the prescriptive period may constitute relevant background evidence where current conduct is at issue).

Here, Complainant initiated her OSHA complaint that is immediately before me on July 17, 2002. Stipulated Fact; TR, p. 7. By statute, any adverse act that occurred within ninety days of this filing was timely before OSHA. Complainant specifically testified receiving notice of an adverse action on December 14, 2001, when her pending reassignment was communicated to her that she would be reassigned away from her position as a Production Control Crew Scheduler. TR, pp. 81, 82, 85-87; CXH1(G). She later characterized this reassignment as a termination of her job as the Production Control Crew Scheduler effective January 5, 2002. TR, pp. 97, 99-100, 135; CXH7(A), pp. 23, 31, and 52. Complainant characterized her reassignment on January 5, 2002 as an adverse action against her by Respondent. TR, p. 79. Either date, *December 14, 2001* - when Complainant first learned of her definite reassignment away from her position as Production Control Crew Scheduler, or *January 5, 2002* - when Complainant was effectively transferred from the same scheduler position, is outside of the ninety day prescriptive period for a timely complaint filing given the July 17, 2002 filing in this case.

Moreover, I hold that Complainant received notice of her pending reassignment away from her Scheduler position on December 14, 2001. TR, p. 81-82, 85-87; CXH1(G). The ninety-day time period begins to toll "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. § 1979.103(d) (2003). Ninety days from December 14, 2001 is *March 14, 2002*, the last day for Complainant to file her complaint containing AIR 21 whistleblower allegations. Therefore, Complainant has failed to show that her July 17, 2002 complainant was timely filed unless there is some equitable reason to excuse her untimely filing.

III. Complainant Has Not Satisfied Her Burden of Establishing Her Entitlement to Equitable Tolling.

A. *Equitable Exceptions General Background*

Prescriptive periods are subject to equitable doctrines such as estoppel, tolling, and waiver. *Morgan, supra* at 2076. The standard for equitable tolling of limitations, however, is a high one and cannot be granted absent "evidence that [the employee] was misled by his employer or was prevented in some 'extraordinary' way from timely filing his claim." *Arcega v. Dickinson*, 1994 WL 139266, *4 (N.D. Cal. 1994)(Title VII action involving pro se litigant). Restrictions on equitable tolling must be "scrupulously observed." *Williams v. Army & Air Force Exchange Serv.*, 830 F.2d 27, 30 (3rd Cir. 1987).

Complainant argues that her untimely filing be excused because it was Respondent's fault that the complaint was not filed timely. TR, pp. 114-117. The statute establishing a ninety-day limitations period for filing an AIR-21 complaint was stipulated to by the parties. TR, p. 7; see also 42 U.S.C.A. § 42121(B)(1). I am guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Hemingway v. Northeast Utilities,* ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4; *Gutierrez v. Regents of the University of California,* ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2.

In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. §§ 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. The court recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting her rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted). Complainant's inability to satisfy one of these elements is not necessarily fatal to her claim. Courts, however, "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984)(*pro se* party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

Complainant bears the burden of justifying the application of equitable tolling principles. *See Wilson, supra*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling); see also *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993). Ignorance of the law will generally not support a finding of entitlement to equitable tolling. *Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities,* ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5. For the reasons that follow, Complainant has not satisfied her burden of justifying the application of the equitable tolling principles.

B. *Respondent Did Not Actively Mislead Complainant Respecting the Cause of Action*

A complainant alleging equitable tolling must present evidence that the defendant "*affirmatively* sought to mislead the charging party." *Villasenor v. Lockheed Aircraft Corp.*, 640 F.2d 207, 208 (9th Cir. 1981)(emphasis added.) Complainant has alleged that Respondent actively misled her by allowing a hostile work environment to go forward to distract Complainant from filing her AIR 21 complaint in a timely manner. TR, pp. 114-117.

Other than the letter acknowledging receipt of Complainant's correspondence received on May 28, 2002 (CXH2(10)), Respondent had no contact with Complainant after her last day at work on March 3, 2002.TR, pp. 163-164. Complainant also testified that no supervisor or manager at Respondent did anything that prevented her from filing her AIR 21 complaint before July 17, 2002. TR, p. 165. In addition, Complainant testified that at no time did any supervisor or manager at Respondent tell Complainant not to file an AIR 21 complaint. TR, p. 163.

Thus, I find that other than Complainant's contradictory testimony, there has been no showing that Respondent engaged in any affirmative form of wrongdoing to either mislead or lull Complainant into inaction because it had no communication with her. As a result, I further find that from December 14, 2001, when Complainant was informed of her reassignment away from the position of Scheduler, until July 17, 2002, when her AIR 21 complaint was filed, nothing prevented Complainant from filing her AIR 21 complaint in a timely manner by *March 14, 2002.* The evidence shows that any air carrier safety complaints Complainant wished to make were certainly known to her by that time and her absence from work after March 3, 2002, did not provide her any new information.

Complainant argues for equitable tolling and that her inadmissible exhibit CXH4(A), a March 22, 2002 email amongst Respondent's management, discovered by Complainant through discovery in March 2003, is somehow key evidence that Respondent lulled Complainant to delay the filing of her July 17, 2002, AIR 21 whistleblower complaint. ALJX8, pp. 9-11. This is Complainant's third attempt to have exhibit CXH4(A) considered by me as an admissible exhibit after I have previously ruled against Complainant on this same issue on relevance grounds at hearing and in denying Complainant's motion for reconsideration. Complainant's motion to recuse me is also improperly based on this evidentiary ruling against her.

Ordinarily, I would not dignify Complainant's contention that an inadmissable piece of evidence should carry the day for her in this bifurcated proceeding by discussing it in my disposition. Because this argument is indicative of Complainant's behavior throughout this litigation, however, I feel compelled to do so in this instance. I review Complainant's argument here liberally, once again, because she is representing herself in *pro se*, and apparently did not receive the order denying her motion for reconsideration in time to adjust her post-hearing brief.

Even if Exhibit CXH4(A) was admissible, it does not assist Complainant's equitable tolling argument. First of all, Complainant states that this is the first notice that she received that

"Respondent had terminated Complainant." ALJX8, p. 9. This is untrue and not credible as of at least March 27 or May 2002, Complainant has maintained that she was terminated from employment with Respondent by her reassignment on January 5, 2002. TR, pp. 97, 99-100, and 135; CXH7(A), pp. 23, 31 and 52. More importantly, Complainant knew that her changed unpaid leave employment status would take her off of payroll as she communicated this when she turned in her security clearance badge. CXH6(D). Also, she knew she had used up all of her sick leave by March 2002 and Respondent informed her of her changed unpaid leave status in June 2002 by sending her the Employee Information Letter Unpaid Injury on Duty Leave Of Absence ("IDLOA") explaining Complainant's status as an employee at Respondent subject to the same layoff or reduction in force rights as active employees, explaining Complainant's active benefits from Respondent for two years, and explaining Complainant's reinstatement rights upon approval by Respondent's medical department(CXH1(S)). Thus, while Respondent's management was discussing its options as part of the March email, disallowed Exhibit CXH4(A), ultimately Complainant was put on IDLOA merely as an appropriate personnel action despite its manager's communicated desire to avoid this. I conclude that this inadmissable email, CXH4(A), presents no evidence from which one could conclude that Respondent committed an act of retaliation against Complainant or lulled her into delaying the filing of her July 17, 2002, AIR 21 whistleblower complaint even if it were admissible evidence.

Finally, in Complainant's testimony at hearing and as referenced in the documentary evidence, it became apparent Complainant delayed the preparation and filing of her AIR 21 whistleblower complaint because Complainant was busy alleging her wrongful termination, and age, race, color, gender, and sexual discrimination claims with Respondent's upper management, the EEOC, and DFEH, that she did not even consider researching and filing this action until July 2002. TR, pp. 121, 158-189. Thus, I will not apply waiver, estoppel or equitable tolling to excuse Complainant's failure to file a timely AIR 21 whistleblower complaint.

C. *Complainant Has Not In Some Extraordinary Way Been Prevented From Asserting Her Rights*

Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, she was unable to obtain vital information bearing on the existence of her claims. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). There have been instances where courts have held that equitable tolling could be applied under circumstances where the complainant was suffering from a mental disability.

I have to accept as true Complainant's admission that she was not suffering from any mental impairment during the critical time period here from December 14, 2001 through July 2002. TR, pp. 106-107; 162. I find, based upon the above evidence, that Complainant was not mentally disabled due to major depression, panic attacks, anxiety, stress, resulting self-doubt, lethargy or lack of energy from on or about December 14, 2001 until July 17, 2002 when she filed her AIR 21 whistleblower complaint. Even though mental incapacity could qualify to toll the statute of limitations, a complainant must make a particularly strong showing. *Beister v. Midwest*

Health Services, 77 F.3d 1264, 1268 (10th Cir. 1996). The traditional rule is that mental illness tolls a statute of limitations only if the illness in fact prevents the sufferer from managing her affairs and thus from understanding her legal rights and acting upon them. *See Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). The more stringent standard allows tolling only if a complainant has been adjudged mentally incompetent or was institutionalized during the filing period as a form of "exceptional circumstances." See *Beister*, supra at 1268; see also *Stoll v. Runyun*, 165 F.3d 1238, 1242 (9th Cir. 1999)(Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time.)

In *Stoll*, the Ninth Circuit found that extraordinary circumstances beyond the plaintiff's control prevented her from filing her claim on time. *Stoll*, *supra* at 1242. The plaintiff in *Stoll* suffered from the effects of defendant's wrongful conduct including repeated sexual abuse, rape, and assault which left the plaintiff severely impaired and unable to function in many respects as she was unable to read, open mail, or function in society and attempted suicide on numerous occasions. *Id.* Here, there has been no evidence that Complainant has been adjudicated to be incompetent or that she was institutionalized or could not function in society. To the contrary, Complainant readily admitted at hearing that she was not mentally disabled during the relevant time from December 14, 2001 through July 2002. TR, pp. 106-107 and 162. Furthermore, Complainant's actions during the critical time period including the preparation of her EEOC and DFEH complaints, her e-mailing and letter-writing campaign all show that she was very able to file her AIR 21 whistleblower complaint on time if she had considered it prior to July 2002. See TR, pp. 107, 121, 158-159 (Complainant did not research the filing of an AIR 21 complaint until July 2002.)

D. *Complainant Has Not Timely Raised the Precise Statutory Claim At Issue In the Wrong Forum.*

As referenced above, equitable tolling may be appropriate "only" when the complainant "has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *School District of the City of Allentown, supra* at 20, quoting *Smith v. American President Line, Ltd.*, 571 F.2d 102 (2nd Cir. 1978); see also *Rockefeller v. CAO, U.S. Dept. of Energy*, 1998-CAA-10 (ARB Oct. 21, 2000), p. 7; *Harrison v. Stone & Webster Engineering Corp*., 91-ERA-21 (Oct. 6, 1992), p. 2..

Complainant was asked directly why she did not file her AIR 21 whistleblower complaint within 90 days of finding out that an adverse action had been taken against her and she responded that she had not even thought about filing an AIR 21 whistleblower complaint because she believed that she had valid Title VII discrimination issues against Respondent. TR, p. 107. Even so, Complainant did not file her Title VII-based EEOC complaint until June 20, 2002 well outside of the 90 day AIR 21 statute of limitation. TR, p. 147; RX19, p. 1. Moreover, Complainant was focused on her Title VII claims and other related employment discrimination claims and testified

that she did not even consider researching or filing an AIR 21 complaint until July 9, 2002. TR, pp. 121, 158-189. In addition, Complainant's EEOC complaint does not provide information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. See RX19. In the alternative, even if the EEOC complaint filed June 20, 2002 contained sufficient information for a "protected activity", Complainant 's June 20, 2002 EEOC filing was not timely filed raising AIR 21 whistleblower allegations in the wrong forum as required to toll the statute of limitations in this case.

Finally, Complainant argues that she filed a complaint challenging her reassignment and termination with the wrong forum, the California Department of Fair Employment and Housing ("DFEH"). ALJX8, Section II(A), pp. 2-9, 15-16. I have already found that Complainant did not file a charge on April 3, 2002 with the California Department of Fair Employment and Housing raising "the precise statutory claim" as is addressed in this proceeding. See my earlier April 29, 2003 Order: (1) Denying Complainant's Motion to Reconsider In Its Entirety, etc. where Complainant makes the same argument present here. While reference was made to a DFEH complaint received as written-up by DFEH on July 31, 2002 (*see* TR, p. 147; RX19, p. 8), there is insubstantial evidence showing that any pleading containing sufficient AIR 21 whistleblower allegations was actually filed in any forum prior to the running of the 90 day statute of limitations on *March 14, 2002*[3] well in advance of the July 17, 2002 complaint in this case. Moreover, the DFEH complaint filed, if at all, no earlier than August 2002 (a date after the July 17, 2002 AIR 21 complaint in this case) fails to properly provide information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. See RX19.

In fact, substantial evidence was provided showing that Complainant's DFEH complaint was actually accepted for filing with the DFEH in August, 2002 and not April 3, 2002 as sometimes alleged by Complainant. TR, pp. 42, 147-149, RX19, pp. 1-10. Alternatively, even if a filing was made at the DFEH and even if it contained sufficient AIR 21 whistleblower allegations sometime in April 2002, this was still beyond the 90 day statute of limitations deadline of *March 14, 2002*. *Id.*

Therefore, on the issue of whether the complaint filed July 17, 2002, ought to be merged with a DFEH complaint filed later on or after August 2002, I find against the Complainant as August 2002 is outside the applicable statute of limitations time period and Complainant failed to satisfy her burden of offering evidence that her DFEH complaint was actually accepted as filed before August 2002 and within the 90 day statute of limitation. Complainant admits that she did

[3] Complainant received notice of her pending reassignment away from her Scheduler position on December 14, 2001. TR,. p. 81-82, 85-87; CXH1(G). The ninety day time period begins to toll "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. § 1979.103(d) (2003). Ninety days from December 14, 2001 is March 14, 2002, the last day for filing a complaint containing AIR 21 whistleblower allegations.

not receive the DFEH complaint until July 31, 2002 for her to sign and file. RX19, p. 8. See also Order:(1) Denying Complainant's Motion to Reconsider In Its Entirety etc. issued post-hearing on April 29, 2003; TR, pp. 148-149. Alternatively, I find that the DFEH complaint does not provide information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. See RX19. Instead, it referenced alleged violations of law from sexual harassment, age discrimination, discrimination under the Americans with Disabilities Act of 1990 ("ADA"), hostile work environment, and other personnel issues. *Id.*

I also find that with respect to Complainant's credibility on this issue, she was not credible in her statement that she filed her DFEH complaint with the California Department of Fair Employment and Housing on April 3, 2002 as she did not provide substantial evidence in support of this bald statement. See ALJX8, p. 3. To the contrary, substantial evidence exists showing the DFEH filing could not have occurred before August 2002 as Respondent admitted first receiving the written-up DFEH complaint on July 31, 2002. TR, pp. 42, 147-149; RX19, p. 8.

Complainant argues that her April 17, 2002 letter to Respondent's executives and Board of Directors contains an attachment that supports her statement that her DFEH complaint was filed with the California DFEH on April 3, 2002. The attachment to the April 17, 2002 letter, however, contains factual references through April 16, 2002. RX13, p. 9 of attachment (April 16, 2002 reference). In addition, the attachment is dated April 17, 2002. RX13, p. 20 of attachment. Even the April 17, 2002 letter to Respondent's management and Board inaccurately references Complainant's EEOC complaint filing pre-dating the April 17, 2002 letter. RX13, p. 3. In fact, Complainant admitted that her EEOC complaint was filed on June 20, 2002 and did not pre-date the April 17, 2002 letter. TR, p. 147; RX19, p.1. Similarly, I reject Complainant's statement that the DFEH complaint filing pre-dated the April 17, 2002 letter as being not credible and unsubstantiated and contradicted by the evidence. See also ALJX9, pp. 7-9.

The above considered, on the issue of equitable tolling, I find against the Complainant and for the Respondent.

IV. In the Alternative, Complainant Has Not Proven That the Various Alleged Actions Were Either *Protected Activities* or *Adverse Actions* to Present a Prima Facie Case

By regulation, a complainant under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, supplemented appropriately by interviews of the complainant, "must allege the existence of facts and evidence to make a *prima facie* showing as follows:

(i) The employee engaged in protected activity or conduct;
(ii) The named person knew, actually, or constructively, that the employee engaged in the protected activity;
(iii) The employee suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b)(1) (2003). See also *American Nuclear Resources, Inc. v. U.S. Dept. of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998)(Energy Reorganization Act); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(same).

A. *Protected Activity*

Whistleblowing protection acts protect concerns that "touch on" the subjects regulated by the pertinent statute. *Nathaniel v. Westinghouse Hanford, Co.*, 91 SWD 2 (Sec'y Feb. 1, 1995); *Dodd v. Polysar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994). Protected activity under the Wendell H. Ford Investment and Reform Act for the 21st Century occurs when:

> [T]he employee (or person acting pursuant to a request of the employee) – (1) provided, caused to be provided, or is about to provide... or cause to be provided... information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of federal law relating to air carrier safety under this subtitle or any other law of the United States.

49 U.S.C. § 42121(a)(1) (2002).

1. *Complainant's Scheduling Work Duties Were Not Protected Activities*

Assuming arguendo, that some equitable reason exists to extend the deadline for Complainant to file her complaint in relation to the December 14, 2001/January 5, 2002 adverse act of her reassignment, her alleged protected activity, consisting of her scheduling tool used in conjunction with scheduling classes and also to help managers pro-actively plan their distribution of maintenance manpower two weeks in advance, was not a protected activity because the alleged disclosure was merely a part of Complainant's normal duties as a scheduler. See *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001)(Reporting in connection with assigned normal duties is not a protected disclosure covered by the Whistleblower Protection Act)(citing *Willis v. Dept. of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998). The rationale in *Willis* for this holding is that Willis's mere performance of his required everyday job responsibilities was not a protected disclosure because Willis cannot be said to have risked his personal job security by merely performing his required duties. *Id.* at 1144.

Similarly here, Complainant's mere performance of her required everyday job responsibilities as a scheduler were not protected activities because Complainant cannot be said to have risked her personal job security by merely performing her required duties. She provided no evidence that she ever communicated any complaint to Respondent or that her work implicated safety definitively and specifically. See *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999)(In FLSA case, employees protected from retaliation who complain to their employer about alleged

violations of Act for there to be protected conduct); see also *Bechtel Construction Co. V. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)(To constitute a protected safety report, an employee's acts must implicate safety definitively and specifically). In fact, Complainant admits that she "did not voice my [her] opinion regarding the disproportionately high layoff that LAX experienced." RX18, p. 7. As a result, Complainant has failed to allege a protected activity under the AIR 21 whistleblower provisions by merely referencing her job duties as a scheduler.

2. *The Evidence Does Not Support Any Protected Activities Prior to the July 17, 2002 Complaint in this Case*

Complainant alleges that there are other protected activities that bring her July 17, 2002 complaint filing within the applicable 90 day statute of limitations. ALJX8, Section II.(A), pp. 8-9 and 13. Specifically, Complainant argues that the "DFEH Complaint served upon the Respondent [with the April - July, 2002 letters to management] was Complainant's first FORMAL INTERNAL notification of safety violations (exclusive of the Weekly Manpower Analyses completed during 2001) and, as such, is not only protected activity because Complainant *filed a formal charge against Respondent*, but is additional protected activity because Complainant chose to report (and thus gave a courtesy 'notice' to Respondent) these violations internally." ALJX8. Pp. 8-9(emphasis in original); see also CXH2(1)-(9).

Neither the DFEH draft complaint sent to Respondent's management nor any of the letters, however, provided information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. See *29 C.F.R. § 1979.102(b) (2003); CXH2(1)-(9); RX13.* Instead, the letter and attached draft DFEH complaint referenced only alleged violations of law from sexual harassment, age discrimination, discrimination under the Americans with Disabilities Act ("ADA"), hostile work environment, and other personnel issues. *CXH2(1)-(9); RX13.* Complainant neither pled nor presented any evidence from which one could conclude that she engaged in protected activity within the meaning of the AIR 21 whistleblower provisions. Complainant made internal complaints regarding personnel issues, not a safety concern.

B. *No Other Relevant Adverse Acts Within 90 Days of Complaint Filing*

Complainant argues that practically all of her actions after January 5, 2002 in response to her reassignments were made "because American Airlines [Respondent] terminated me from my position of Crew Scheduler for reasons other than performance." CXH7(A), pp. 35-36. Despite this declaration, Complainant's post-hearing brief argues that beyond the adverse act identified as the January 5, 2002 reassignment from her position as Scheduler with corresponding notice on December 14, 2001, there are other adverse acts that convert her July 17, 2002 complaint filing into a timely filing. ALJX8, Section II, *Discussion of Remaining Exhibits*, pp. 11-15.

Without a *prima facie* showing of some protected activity, the complaint must be dismissed. See 29 C.F.R. § 1979.104(b)(1)(i). The only proven protected activity here is

Complainant's filing of her July 17, 2002 complaint before me. Any alleged adverse acts which pre-date the July 2002 filing of Complainant's AIR 21 whistleblower complaint cannot have been made in retaliation for the subsequent filing of her July 17, 2002 complaint. See *Hasan v. Reich*, unpublished (5th Cir. May 4, 1993)(fact that employer's decision to terminate employee was made before it learned of employee's protected activity dooms complaint); *Batts v. NLT Corp.*, 844 F.2d 331, 334 (6th Cir. 1988)(alleged retaliatory remark could not have been made in retaliation for events which had not yet occurred). Thus, the events outlined by Complainant on pages 14-15 of her closing brief (ALJX8), were not retaliatory adverse actions.

In order for any adverse act to result in a timely filing of Complainant's AIR 21complaint, the adverse act must have occurred within 90 days of the July 17, 2002 complaint filing, or on or after *April 18, 2002*. See *29 C.F.R. § 1979.103(d)(2003)*. Assuming *arguendo*, that there was some actual protected activity by Complainant, the only events put forth by Complainant within this time frame involve the May 10, 2002 letter from Respondent requesting that Complainant return her security clearance badge due to leave of absence status (RX17) and the June 19, 2002 Employee Information Letter Unpaid Injury on Duty Leave Of Absence ("IDLOA") explaining Complainant's status as an employee at Respondent subject to the same layoff or reduction in force rights as active employees, explaining Complainant's active benefits from Respondent for two years, and explaining Complainant's reinstatement rights upon approval by Respondent's medical department (CXH1(S)). ALJX8, pp. 14-15.

The May 10, 2002 letter requesting Complainant's return of her security clearance badge is not an adverse action but merely a natural effect of Claimant's unpaid status given her medical restrictions and her being off payroll due to her leave. Complainant even acknowledged her acquiescence to this practice by stating that she understood that it was customary to return the badge when an employee is off payroll as the badge is the property of the Los Angeles World Airport and she complied because she knew she was off payroll. CXH6(D).

The June 19, 2002 IDLOA is also the natural consequence of Complainant's revised medical restrictions after the January 2002 Agreed Medical Examination in Complainant's California Workers' Compensation case with Respondent. See RX1; RX3; and RX9. The June 19, 2002 IDLOA merely clarifies Complainant's status at Respondent which, contrary to Complainant's allegations, indicates that Complainant's employment had not been terminated while she was on unpaid leave and that Complainant retained reinstatement rights and various employment benefits common to inactive employees such as Complainant. See CXH1(S).

I conclude that Complainant neither pled nor presented any evidence from which one could conclude that Respondent committed an act of retaliation against Complainant within ninety days prior to the filing of her July 17, 2002 complaint. Even so, in the alternative, I find that the mere fact that the these isolated effects of the alleged discriminatory reassignment from December 2001 continue into the limitations period does not provide a basis for concluding that the July 17, 2002 complaint was timely filed here. See *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

Findings of Fact and Conclusions of Law

1. The complaint filed July 17, 2002 is at issue.
2. The complaint falls within the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.
3. Complainant was not engaged in protected activity under the Act when she created a scheduling tool that reported manpower availability for each overnight airplane at LAX and has failed to present evidence of any protected activity other than the filing of the July 17, 2002 complaint.
4. The obvious facts sufficient to support a discrimination complaint were apparent to Complainant no later than December 14, 2001 when she was first informed by her supervisor that she was being reassigned away from her scheduler position with Respondent. There was no contact by Complainant with the EEOC or the California DFEH within 90 days to complain of discrimination because of "blowing the whistle."
5. The evidence does not show that Respondent misrepresented or fraudulently concealed facts necessary for Complainant to complete her complaint or induce her to delay filing the AIR 21 whistleblower complaint.
6. The evidence does not support finding that any meeting took place in 2002 between Respondent's representatives and Complainant which Complainant could reasonably assume she was being reassigned back to her scheduler position or transferred to any other position desirable to Complainant.
7. The evidence does not establish any conduct by Respondent which lulled Complainant into delay or inaction regarding her whistleblower cause of action.
8. Complainant did not file a complaint within 90 days with any federal or state agency or alternative forum alleging discrimination because of some protected activity under the AIR 21 whistleblower statute.
9. The evidence does not establish that the July 17, 2002 complaint meets any of the criteria for invoking the equitable tolling, waiver, or estoppel provisions of the law. There are no overriding equities extending the 90 day filing provisions of the law.
10. Complainant has not met her burden of proof.

11. Complainant's Motion to Compel production of further documentation from Respondent in response to seven subpoenas is denied without prejudice for purposes of the bifurcated hearing as Respondent provided substantial evidence in the form of Complainant's personnel file, medical file, electronic ("EAP") file and oral argument that it properly provided the requested documentation for the relevant time period of December 2001 through August 2002. In addition, Complainant failed to provide substantial evidence in support of her motion showing that relevant documents were withheld concerning her primary argument of equitable tolling due to alleged misrepresentation on the part of Respondent.

CONCLUSION

Having considered all of the evidence, having read the parties' briefs and being otherwise fully informed, I recommend that Complainant's Complaint, filed on or about July 17, 2002, be dismissed as it was not timely filed.

A

Gerald Michael Etchingham
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found in OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).